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In the

United States District Court

for the District of Oregon

JOHN W. TOCCO,
Appellant,

-vs-

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

Civil Action No. 6453

JURISDICTIONAL STATEMENT OF APPELLANT

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JOHN W. TOCCO, *Appellant,* -vs- UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees.*	Civil Action No. 6453

JURISDICTIONAL STATEMENT OF APPELLANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 15 of the Supreme Court of the United States, as amended, John W. Tocco, plaintiff herein submits his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on a direct appeal to review the judgment of a three judge District Court entered in this cause on July 14, 1954, by Circuit Judge Clifton Mathews and District Judges Claude McColloch and Gus J. Solomon.

OPINION BELOW

The United States District Court for the District of Oregon dismissed plaintiff's complaint without opinion. The Court requested that defendants prepare findings of fact and conclusions of law and order, copy of which is attached hereto as Appendix A.

JURISDICTION

This appeal is prosecuted from a final order dismissing plaintiff's complaint for want of equity in an action to set aside, annul and suspend an order of the Interstate Commerce Commission issued on July 18, 1947, and to enjoin the enforcement thereof under 62 Stat. 931 (Title 28 U.S.C., Sections 1336-1337); 62 Stat. 936 (Title 28 U.S.C., Section 1398); 62 Stat. 968 (Title 28 U.S.C., Section 2284); 62 Stats. 969-970 (Title 28 U.S.C., Sections 2321-2325); and 60 Stat. 237 (Title 5 U.S.C., Section 1009). The final judgment order sought to be reviewed herein was made and entered July 14, 1954, and the notice of appeal was filed in the above entitled Court on September 13, 1954. The jurisdiction of the Supreme Court to review by direct appeal the judgment order entered in this cause is conferred by 62 Stat. 928 (Title 28 U.S.C., Section 1253) and 62 Stat. 961 (Title 28 U.S.C., Section 2101 (b)).

The following decision sustains the jurisdiction of the Supreme Court to review the final order in this case on direct appeal:

> Radio Corporation of America vs. U. S., 71 S. Ct. 806, 341 U.S. 412, 95 L. Ed. 1062 (1951).

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QUESTIONS PRESENTED

The major questions presented by this appeal are:

1. When insurance companies cancel and refuse to write insurance on a carrier's equipment because of an accident for which he wasn't at fault, thereby causing interruptions in the carrier's service because of the refusal of state agencies to grant operating permits due to lack of insurance, are such interruptions within the control of the carrier-applicant within the meaning of the "grandfather clause" of Section 206, Part II, Interstate Commerce Act?

2. Was the final order of the Interstate Commerce Commission disallowing appellant "grandfather" rights based on substantial evidence?

3. In making and entering said order did the Interstate Commerce Commission exceed its statutory authority?

4. In making and entering said order did the Interstate Commerce Commission act arbitrarily and capriciously?

5. In making and entering said order did the Interstate Commerce Commission base it upon erroneous interpretations of the law?

6. Did the District Court err in upholding said order of the Interstate Commerce Commission?

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, Title 49, Chapter 8, U. S. Code, are as follows:

"Sec. 203. (a) "As used in this part—

(1) The term 'person' means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof. (64 Stat. 574)

(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, . . . (54 Stat. 920)

Sec. 206 (a) (1) . . . no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certifiicate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, *except in either instance as to interruptions of service over which the*

applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this action and within one hundred and twenty days after such section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part." (Emphasis added) (54 Stat. 923)

STATEMENT OF THE CASE

The findings of fact made by Division 5 of the Interstate Commerce Commission on July 19, 1943, quickly sum up what this case is about (P's Ex. 7).

"Applicant began operating in 1928 as a common carrier by motor vehicle of property. On October 5, 1934, he received a permit from the Washington Department of Public Service authorizing the transportation of specified commodities. On December 5, 1934, he was also authorized by the Public Utilities Commissioner of Oregon to operate as a common carrier, anywhere for hire, in interstate commerce only. Some time late in 1934 one of his vehicles, while properly parked on the side of a road undergoing repairs, was involved in a serious accident with another car, as a result of which suit was filed against applicant in Idaho. Early in 1935 his insurance policies were canceled because of the pending law suit. Efforts were made to obtain insurance from various other insurance companies, but in this applicant was unsuccessful. Since the Washington and Oregon Commissions required carriers to maintain insurance, applicant's failure in this respect resulted in recision by those States of his operating authorities. Thereafter, he caused two of his employees to obtain insurance in their names, together with appropriate authorities from the two States in question. Applicant paid the premiums on the insurance, however, as well as the cost of operation. The employees received only their wages. The operation was being conducted in this manner on June 1, 1935. Subsequently, the insurance company, discovering the operation to be applicant's canceled the insurance, which once more resulted in recision of the State authorities. Applicant then began operating as a private carrier, and turned his interstate traffic over to other for-hire carriers for transportation. Later he entered into negotiations with Ernest Albert Beck, in whose name insurance was obtained; and also appropriate Washington and Oregon operating authorities on January 3, 1936 and January 4, 1936, respectively, and interstate operation was resumed. On February 12, 1936, Beck filed in his own name the "grand-

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father" clause application, No. MC-18209, claiming bona fide operation in his own name and right on the statutory date. Beck, however, clearly was never any more than an employee of applicant. The operation was conducted in Beck's name until March 24, 1936, when the insurance company discovered applicant's interest and again canceled the insurance. Operation as a private carrier was then resumed. In April 1936 applicant filed the application, No. MC92633, claiming the right to a certificate by reason of his operation in the name of others on and after the statutory date. In September 1936, which was apparently after a conclusion favorable to himself and his insurer of the law suit arising out of the above-mentioned accident, applicant obtained insurance in his own name, resumed operation, and has operated continuously since that time. As indicated, he was substituted for Beck as applicant in No. MC-18209 and succeeded to whatever rights Beck had. Applicant is now, therefore, the sole party in interest in both proceedings."

The foregoing facts have remained undisputed throughout the handling of this case from its inception and from these facts the Commission has made the following conclusions in denying the plaintiff-applicant his "grandfather" rights under MC-18209:

1. "On the authority of the Gregg case the Joint Board finds that the interruption of operation was one over which applicant had control and that, therefore, the failure to operate works a forfeiture of whatever rights he might have had under the "grandfather clause". Report and Order of Joint Board No. 81, Feb. 18, 1939 (P's Ex. 4).

2. "As successor to Beck, applicant obviously cannot be granted authority except on a showing that the former had a bona fide operation of his own on and continuously after the statutory date to the time

> of applicant's succession. That he did not, and that applicant can take nothing as successor is clear from the facts already stated. Application No. MC-18209 will accordingly be denied". Report of Division 5, June 19, 1943 (P's Ex. 7).

The foregoing conclusions were approved by the Commission throughout its handling of the case and in each instance the conclusions are erroneous as a matter of law and are not supported by the evidence.

Interruption in service was not within applicant's control. The gist of the testimony in this case is that plaintiff's insurance was cancelled arbitrarily, not through any failure on the part of plaintiff such as non-payment of premiums, but solely because insurance companies would not write "long haul anywhere for hire insurance" during 1935 and 1936, and plaintiff could not obtain any insurance because of this general reluctance on the part of insurance companies. The situation was so serious that several attempts were made to set up reciprocal insurance exchanges to write insurance for "long haul anywhere for hire carriers" and, indeed, Consolidated Freightways was without insurance for a time during the critical period.

The Commission's finding, therefore, that the interruption in plaintiff's service was within his control was not based upon the evidence. In fact, the evidence was contrary to this finding. The only justification for such a finding is that the interruption was within plaintiff's control as a matter of law. The fact of control or no control was thus made a conclusion of law. The joint board purportedly based this conclusion upon the holding of the

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Commission in the Gregg Cartage and Storage Co., Com. Car. App., 21 M.C.C. 17, November 14, 1938, which was affirmed by the Supreme Court of the United States in *Gregg Cartage and Storage Co. v. U. S.*, 316 U.S. 74, 86 L. ed. 1283 (1941). The holding in the *Gregg* case, however, should not be controlling here, but rather, that case is properly construed to apply only to interruptions in service due to involuntary bankruptcy.

The *Gregg* case stands for the proposition that, under Section 206 (a) of the Motor Carrier Act, an interruption in service due to an adjudication in involuntary bankruptcy is within the control of the bankrupt carrier as a matter of law. There, the applicant's insurer had become insolvent, leaving the applicant to disprove and settle, as best it could, numerous claims against it, most of which were founded upon the alleged negligent operation of vehicles for which the applicant was in some way held legally responsible. While attempting to settle these claims, the applicant soon became insolvent, and it filed a creditor's bill in the state court. On the day the state court appointed a receiver for the applicant, with authority to continue the business, other creditors filed a petition in involuntary bankruptcy against it, and the applicant was duly adjudicated a bankrupt. Operations ceased with the appointment of the trustee in bankruptcy, who later sold applicant's rights under the grandfather clause of the Motor Carrier Act at public auction. The Commission, with five commissioners dissenting, ruled that an interruption in service within the control of the applicant had occurred. The applicant appealed to the Supreme Court

on the ground that the Commission was obliged to trace out the chain of causation and weigh the bankrupt's judgment against the pressures of circumstance. The Supreme Court, in an opinion written by Mr. Justice Jackson, sustained the Commission in construing the Motor Carrier Act as not requiring it to go back of the bankruptcy adjudication to search for ultimate causes. Mr. Justice Douglas dissented, and Mr. Justice Black and Byrnes concurred in the dissent.

The main ground upon which the Supreme Court rested its opinion was that, under the Bankruptcy Act, an involuntarily adjudication results only from some act of bankruptcy, defined in the Act "upon the clear assumption that it is within the bankrupt's control." As added "make-weight" reasons for its holding, the Court felt obliged to point out: (1) The complexity of the chain of causation and the consequent impracticality of any other rule:

> "The Commission was warranted in holding as a matter of law that the interruption because of bankruptcy was not one over which the applicant had no control within the meaning of the Motor Carrier Act. The complexity of the chain of causation shown in this case makes it an apt illustration of the impracticality of any other rule."

(2) That the filing of the creditor's bill was a voluntary act, likely to provoke other creditors to file the bankruptcy petition:

> "Thus, the petitioner not only arranged deliberately to commit an act of bankruptcy, but it managed the affair in a manner not unlikely to provoke the unconsulted creditors to file a petition in bankruptcy—"

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(3) That it was applicant's voluntary acts which led to the claims, based on negligence, against it; (4) That although applicant's misfortune stemmed from the insolvency of its insurer, there was no showing what caution was used in choosing the insurer; (5) That, in any event, applicant's own insolvency cannot be said to have been brought about solely by matters over which it had no control;

> "In any event, the choices of insurers, as well as of its servants and operators, were (applicant's) own —as was the judgment which was exercised with regard to the numerous other phases of its business bearing upon its solvency — and the final product could not have been a matter over which it had *no* control." (Emphasis by Mr. Justice Jackson.)

and, (6) anyway, the trustee in bankruptcy could have been authorized to continue the business, but the creditors failed to seek such authorization.

Without weighing these reasons, suffice it to say that none of them could be factors in the case at bar, where the interruption in service was due to the inability of the applicant to obtain insurance, not to an adjudication in involuntary bankruptcy. In the first place, there is no Act of Congress, nor any state law, defining inability to obtain insurance upon the "clear assumption that it is within" the applicant's "control". The matter of control was conclusively presumed against the applicant in the *Gregg* case by reason of the Bankruptcy Act definition of acts of bankruptcy. No such statutory definition, presumption or otherwise is pertinent here.

Secondly, the chain of causation in the instant case is not complex, nor does it involve subtle philosophical distinctions between voluntary and involuntary acts. The evidence plainly showed that it was through no fault or omission of the plaintiff that he was unable to secure insurance. Rather, it showed that his insurance difficulties stemmed from the arbitrary refusal of various insurers to underwrite insurance for long haul "anywhere-for-hire" operators during 1935 and part of 1936. Had plaintiff's insurance been cancelled for failure to pay premiums, this case might be different. But, here, plaintiff's insurance was cancelled for no wrongful act or omission on his part.

The only two acts which could, by any stretch of the imagination, be deemed within plaintiff's control were: (1) choosing an insurer; and (2) parking a disabled truck along the side of the road. Choice of an insurer, however, assumes that there are two or more available insurers to choose from. Plaintiff had no choice in the instant case, because, as the evidence showed, there were no insurers available. So, plaintiff's "choice" of insurer, unlike the *Gregg* case, can hardly be called within his control.

It is true that plaintiff's employees parked a disabled truck at the side of the road and that some one later struck the truck and sued plaintiff for damages. And it is probably true that this action for damages was one of the impelling reasons for various insurers' subsequent refusal to insure plaintiff. However, plaintiff was absolved from all blame for this accident, and while parking the truck may be said to have been within his control, the act was not negligent nor wrongful. Furthermore, to base the

matter of plaintiff's control upon the act of parking a disabled truck along the side of the road would certainly be indulging in subtle philosophical distinctions between voluntary and involuntary acts and would create a complex chain of causation where none now exists.

Finally, unlike the *Gregg* case, there was no way for plaintiff to operate legally without the insurance, which was so arbitrarily denied him. The States of Oregon and Washington could not have issued plaintiff the necessary permits nor authorized his operation without this insurance. Plaintiff exhausted, in vain, every legal means open to him to operate during this critical period.

The *Gregg* case is, for the above reasons, not controlling of the case at bar. Therefore, the Commission's ruling that interruptions in plaintiff's service were not such interruptions over which plaintiff had no control, as a matter of law, and based upon the *Gregg* case, was and is erroneous. It is an erroneous interpretation of the *Gregg* case, and it is erroneous as a matter of law.

In the subsequent hearings before the Commission and at the trial below, it was urged and found that there was no showing at any of the hearings that a certain Beck, plaintiff's predecessor in interest, had a bona fide operation of his own, on and continuously after, June 1, 1935, the statutory date, to September, 1936, the date plaintiff resumed operations; that, on the contrary, it was shown that Beck's operations ceased in the spring of 1936, and therefore his operations have not been continuous to the date of plaintiff's resumption of operations; and that,

further, it was shown that Beck was not in operation on June 1, 1935, nor did he acquire rights from one who was operating on that critical date.

The above argument is deceptively based upon a wholly false premise, the false premise being that all of plaintiff's rights to a grandfather certificate are solely derivative from Beck, and unless Beck could have established his right to a grandfather certificate, plaintiff cannot prevail. This false premise is deduced by technical and legalistic distinctions drawn by the Commission and the lower court, which do not accord with reality and which are contrary to the evidence adduced at the hearings.

It is true that Beck applied for a grandfather certificate under section 206(a) of the Motor Carrier Act on February 12, 1936, and that Tocco was substituted in lieu of Beck on October 17, 1936; No. MC-FC 392; however, these facts alone do not reveal the true nature of the relationship between Beck and the plaintiff, nor do they reveal the nature of plaintiff's operations during the critical period from 1935 until 1936 when plaintiff encountered his insurance difficulties.

The true nature of the relationship between Beck and the plaintiff, and the nature of plaintiff's operations during the critical period, were clearly shown by the evidence presented at the hearings, from which one conclusion is inescapable—that continuously from 1928 to date the business has always been plaintiff's business and that Beck was at best a mere agent, servant or employee of the plaintiff.

THE QUESTIONS ARE SUBSTANTIAL

The questions raised by this appeal are substantial enough to require a plenary consideration by the Supreme Court with briefs on the merits and oral argument for their resolution because the Interstate Commerce Commission and the United States District Court, for the District of Oregon, have misconstrued and misapplied the letter and intent of the Interstate Commerce Act and have reached conclusions of law thereunder contrary to their factual findings. The conclusions of the Interstate Commerce Commission in this case have been unlawful, illegal, arbitrary and capricious and the trial court's conclusion is contrary to law. We believe and submit that the questions submitted by this appeal are substantial and are of public importance.

Respectfully submitted,

JAMES H. GANOE, HERBERT H. FRIESE
and EASLEY & WHIPPLE

By NORMAN L. EASLEY

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN W. TOCCO, Plaintiff,	)	
vs.	)	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	)	Civil Action No. 6453.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on regularly for trial and the Court having duly considered the matter and being fully advised in the premises now makes the following:

FINDINGS OF FACT

1. This is an action to set aside, annul, and suspend an order of the Interstate Commerce Commission, issued on July 18, 1947, and to enjoin the enforcement thereof, under Title 28, U.S.C., Sections 1336, 1337, 1398, 2284, 2321 to 2325, and Title 5, U.S.C., Section 1009.

2. The Reports and Order in suit were entered in a proceeding conducted by the Interstate Commerce Commission under Title 49, U.S.C., Section 306, upon application filed by Ernest Albert Beck in Docket No. MC-18209 on February 12, 1936, and whose interest in such application was transferred by said Beck to plain-

tiff by an assignment duly approved by the Interstate Commerce Commission on October 17, 1936.

3. The said application was considered by three different joint boards, each constituted under authority of the Interstate Commerce Act, consisting of one member from each of the States of Washington, Oregon, and Idaho, assisted and advised by an examiner of the Commission and was considered by Division 5 of the Interstate Commerce Commission in three successive Commission Reports, all of which found that the application should be denied, resulting in the order of July 18, 1947, denying the application which order is the subject of this action.

4. The Interstate Commerce Commission based its denial of the application upon the evidence adduced at the said hearings, upon the findings of the said joint boards, and upon its own findings, to the effect that Ernets Albert Beck, plaintiff's predecessor-in-interest, had not shown that he had been engaged in bona fide operation in the transportation of property by motor vehicle in interstate or foreign commerce on and continuously after June 1 or July 1, 1935, to the time of plaintiff's succession, or that he had acquired the rights of a common or contract carrier who was so engaged, and that John W. Tocco, plaintiff herein could therefore take nothing as such successor-in-interest; and said findings of the Commission are amply supported by the evidence presented at the said hearings.

5. Subsequent to the entry on July 18, 1947, of the order denying the application, plaintiff herein filed with

the Commission his Petition for Reconsideration of the Commission's action, which petition was denied by the entire Commission on December 4, 1947.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action under Title 28, U.S.C., Section 1336, 1337, 1398, 2284, 2321 to 2325, and Title 5, U.S.C., Section 1009.

2. The Interstate Commerce Commission had jurisdiction to enter the reports and order in suit under Title 49, U.S.C., Section 306.

3. The Interstate Commerce Commission made the necessary ultimate findings that the evidence before it failed to show that Ernest Albert Beck, applicant, or plaintiff as his successor-in-interest, was entitled to a certificate under the "grandfather" provisions of said Section 306 of Title 49, U.S.C.

4. The action of the Commission in issuing its Order of July 18, 1947, in the proceeding before it in Docket No. MC-18209 denying the application of Ernest Albert Beck, and of plaintiff as his successor-in-interest, is supported by adequate findings based upon substantial evidence in the record as a whole and was not arbitrary, capricious, nor in excess of its statutory power.

5. There is a rational foundation and basis for the issuance by the Interstate Commerce Commission of the order of July 18, 1947, in Docket No. MC-18209, denying the said application.

6. The plaintiff is not entitled to the relief sought herein, and the injunction should be denied and the complaint dismissed.

Dated this 14th day of July, 1954.

Clifton Mathews
United States Circuit Judge.
Claude McCulloch
United States District Judge.
Gus J. Solomon
United States District Judge.

Certified to be a true and complete copy of the original proposed Findings of Fact and Conclusions of Law.

Victor E. Harr
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN W. TOCCO, Plaintiff,	)	
vs.	)	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	)	Civil Action No. 6453.

ORDER

PRESENT: MATHEWS, Circuit Judge, McCULLOCH, District Judge, and SOLOMON, District Judge.

And now, to wit, this 14 day of July, 1954, it is

Ordered that the Complaint in the above-entitled case be and the same is dismissed for want of equity.

By the Court

Clifton Mathews, U. S. Circuit Judge
Gus J. Solomon, U. S. District Judge
Claude McCulloch, U. S. District Judge

Certified to be a true and complete
copy of the original proposed order.

Victor E. Harr
Assistant United States Attorney